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Mr. Howard G. Borgstrom,
Director, Business Operations Center,
Office of the Chief Financial Officer,
U.S. Department of Energy, Mailstop CF-60
Room 4A-221
1000 Independence Avenue, SW.
Washington, DC 20585.

Transmitted via E-mail to lgprogram@hq.doe.gov

Subject: Comments on the Notice of Proposed Rulemaking Implementing the
Energy Loan Guarantee Program

Dear Mr. Borgstrom:

Thank you for your, and your staff's, coordination and execution of the U.S. Department of Energy (DOE) public comment session on the Notice of Proposed Rulemaking regarding DOE's proposed Energy Loan Guarantee Program (the "NOPR," published at 72 Fed. Reg. 27471 on May 15, 2007). When I appeared at that session, held on June 15, 2007, I provided comments on behalf of the Large Public Power Council.¹ The remarks that follow reiterate the points that I made at the June 15th Public Meeting sponsored by DOE. The comments that follow address additional technical issues in the NOPR and provide our endorsement for comments being filed by the Nuclear Energy Institute and joint comments being filed by Constellation Energy Group, Entergy, Exelon and our partner at the South Texas Project (STP), NRG Energy, Inc. The following are CPS Energy's additional comments in response to the NOPR.

¹ Large Public Power Council (LPPC) is an association of twenty-four of the largest governmentally owned electric utilities in the United States, of which CPS Energy is a member. LPPC members include not only the largest governmentally owned retail systems in the country but also a number of wholesale sellers of electricity that serve municipally owned retail systems. It is estimated that LPPC members serve approximately 18 million retail customers and own and operate electric generation facilities that produce over 11,610,000,000 megawatt hours of generation annually. LPPC members are located throughout the country, in states including California, Colorado, Arizona, New York, Texas, Washington, Florida, Georgia, Nebraska, and South Carolina.

Background

CPS Energy is the City of San Antonio, Texas, acting by and through the City Public Service Board, a Texas municipal utility operating the electric and gas systems in and around San Antonio. CPS Energy is currently an owner of a 40% interest of the two existing pressurized water reactors at STP, providing CPS Energy with approximately 1,050 megawatts of electricity, which CPS Energy uses to serve customers within its certificated electric service area. In June 2006, representatives of CPS Energy's partner at STP, NRG Energy Texas, LLP, owner of a 44% interest in the STP Units 1 & 2, announced their intention to add two new advanced boiling water reactors at the STP site. As a current owner of an undivided interest in the South Texas Nuclear Project, CPS Energy has a right to participate in the development of new units at that site. The availability of incentives promised in the Energy Policy Act of 2005 (Act) to promote development of advanced non-greenhouse gas emitting technologies, in particular a viable DOE loan guarantee program, is a critical element in CPS Energy's decision making regarding whether to participate in the development of new units at STP.

Comments

On behalf of CPS Energy, thank you for your consideration of these comments. CPS Energy is one of several public power entities that currently own a significant interest in an operating commercial nuclear power plant. Like several of these companies, CPS Energy is a co-owner in its nuclear plant with an investor owned utility. Thus, for CPS Energy and other public power entities to go forward in partnership with investor owned utilities it is essential that DOE correct critical flaws in its draft loan guarantee program. Because it shares many of the same concerns with other private entities and it needs the loan guarantee program to be viable for itself and its partner, CPS Energy endorses the joint comments being filed by Constellation Energy Group, Entergy, Exelon, and NRG Energy, Inc., as well as comments being filed by the investment banking community and the Nuclear Energy Institute.

In addition, CPS Energy specifically offers comments proposing to (1) eliminate the NOPR sections related to the regulatory prohibition against the program backing tax exempt debt, (2) revise the amount of equity contribution required for public power entities, (3) allow loan guarantees to be issued once a nuclear license application to the U.S. Nuclear Regulatory Commission (NRC) is found to be administratively complete, (4) publish the cost of subsidies and fees or a fee formula as part of the rule, (5) allow loan guarantee fees to be included as part of the guaranteed debt, (6) eliminate any requirement for a pre-application for loan guarantees associated with nuclear projects, and (7) allow investor owned utilities and public power owners of undivided interests in a qualifying project to each be eligible to be an applicant for a DOE loan guarantee. In addition to these comments, we also have addressed DOE's request for comments related to the definition of "new or significantly improved technology." Our comments on each of these issues follow.

1. Delete the Proposed Regulatory Prohibition for backing Tax-Exempt Debt

Draft Section 609.10(e)(7) provides that the loan guarantee may not finance, either directly or indirectly, tax-exempt obligations. Section 149(b) of the Internal Revenue Code similarly prohibits municipalities from issuing tax-exempt obligations that are federally guaranteed. Thus, to the extent that such a prohibition is needed, it exists in the statute and is not also needed by DOE regulation. However, Section 149(b)(3) of the Internal Revenue Code provides a number of legislatively mandated exceptions to this prohibition including bonds guaranteed by the Bonneville Power Authority, the Student Loan Marketing Association and the Federal Housing Administration. As Title XVII of the 2005 Energy Policy Act does not prohibit the issuance of loan guarantees for tax-exempt obligations, it may be possible that one of the statutory exceptions apply in the future to otherwise qualifying projects for the DOE loan guarantee program. we request that the Department of Energy not exercise its discretion to prohibit such tax exempt guarantees in its regulations in the event that there is a time in the future that guarantees of nuclear loans to public power entities qualify for an exception to the then existing Internal Revenue Code.

2. Revise the Equity Requirements to Recognize the Credit Quality and Lending Practices of Public Power Entities

Draft section 609.10(d)(5) requires that "the [b]orrower and other principals involved in the project have made or will make a significant equity investment in the project". A similar requirement exists in proposed Section 609.7(b)(7) and Section 609.7(a)(6)) would require DOE to deny a loan application if the applicant will not provide a significant equity contribution. Public power entities do not have investors that provide equity, but rather they fund projects based upon their ability to collect funds from ratepayers, which enables such entities to make principal and interest payments for project debt that covers 100% of a project's cost. CPS Energy and many of the other public power entities are highly rated by the investment community. The loan quality is not enhanced by having a specific level of equity contribution. The financial markets have accepted this level of debt capitalization based on the public entity's unfettered and unregulated ability to increase rates in the amounts necessary to pay the debt service on its outstanding obligations. Every revenue bond resolution requires the municipal utility to set its rates at a level at least sufficient to cover its annual debt service.

Public power entities have no ability to raise equity to invest in new generation except to the extent they raise rates *in anticipation* of needing equity in the future. This is an extremely inefficient and costly practice that would result in ratepayers being charged increased rates well in advance of the placed in service date of the financed facility. Rate payers would then be paying higher rates without having the resulting power until some point in the future. As such, we request that the guarantee rules allow for public power entities to issue debt to finance 100% of their Project Costs, subject to continued market acceptance of this practice, and accept bond resolutions and contributions of site assets and project development costs as the applicant's equity contribution to the project. With respect to requirements for project equity, DOE should be charged with

evaluating the overall quality of the financing, and not with setting artificial limits for financing.

Finally, DOE staff should be aware that, in order to develop and submit a combined operating license application (COLA) for a qualifying nuclear project to the NRC, the applicant must have spent tens to hundreds of millions of dollars on purchasing and developing the site and for developing the COLA itself. When measuring the equity contribution being made by an applicant, that measurement should not take the form money in an account reserved for the project. Rather, DOE should apply appropriate credit for the equity contribution by an applicant that has invested heavily in the project before seeking the loan guarantee and final project financing. For all of these reasons, DOE should consider on a case-by-case basis, the equity requirement, including in its review the credit quality of the applicant and the viability of the project. The equity requirement should be reduced or at least evaluated on a case-by-case basis for applicants from credit-worthy parties, such as highly rated public power entities.

3. Permit Issuance of Loan Guarantees for when the NRC Declares the COLA Administratively Complete

Once a COLA has been submitted, the Director of Nuclear Reactor Regulation will inform the applicant whether any portion of the application is incomplete and not acceptable for processing within 30 days of the COLA being filed with the NRC. 10 CFR 2.603(a). The NRC is currently estimating that it will take approximately 42 months from the time that a COLA is filed until the license will be issued.² In the mean time, unless the project developer stops all work until the NRC license is issued, the developer of a new reactor project may incur more than one quarter of the project costs associated with site engineering services, project planning and procurement of long-lead equipment and materials. In the absence of a loan guarantee program, the project developer will have to seek interim financing that may or may not be available in the absence of loan guarantees. At a minimum, funds borrowed in the absence of loan guarantees will likely be more costly to developers, if such funds are available at all. If such funds are not available, the project will be delayed by 42 months, which would, at a minimum, compromise the net present value of the project and, in some cases, result in cancellation of the project entirely. In order to allow timely approval of funds for qualifying new nuclear projects, DOE should accept applications for loans related to such projects at any time after the NRC has accepted the COLA associated with that project as administratively complete.

4. Publish Subsidy Costs, Fees or a Fee Formula as Part of the Rule

Currently, the NOPR makes reference to various administrative fees and only provides that, under Section 609.9(d)(3) on or prior to closing date, OMB must review and approve DOE's calculation of the subsidy cost. DOE (and OMB and Treasury) should

² See <http://www.nrc.gov/reactors/new-licensing/new-licensing-files/new-rx-licensing-app-legend.pdf>. Other estimates show the license application processing may take from between 3½ and 5 years. See, e.g., <http://www.utilipoint.com/issuealert/article.asp?id=2546>

recognize that credit-worthy borrowers will consider all available avenues to finance qualifying power plant projects, including through the use of loans backed by the DOE loan guarantee program. It is impossible to make a reasoned choice among alternatives if the costs and fees associated with the DOE loan guarantees are opaque until after the borrower has made a commitment to finance the project using the DOE loan guarantee program. Therefore, we request that DOE either publish all of its fees or a formula for its fees that will allow a potential borrower to determine the costs of the loan guarantee before pursuing one.

5. Allow Loan Guarantee Fees to be Included as Part of the Guaranteed Debt

DOE proposes to define "Project Costs" as "those that are necessary, reasonable, customary, and directly related to the design, engineering, financing, construction, startup, commissioning and shake down of an Eligible Project." From the definition of Project Costs, DOE proposes to exclude those costs that "cover initial research and development costs, the credit subsidy cost, any administrative fees . . . , and operating costs after the facility has been placed in service." If the costs are not Project Costs, DOE proposes to exclude such costs as be eligible to be considered as part of the costs for which a guarantee could be sought. DOE seeks comments on its definition of Project Costs. Section 609.12(c)(1), (7); 72 Fed. Reg. 27474, 27486-87. The loan fees DOE has proposed include (1) a filing fee, (2) the conditional commitment or Second Fee, and (3) the Third Fee at closing, Sections 609.6(b)(2), 609.8(d), 609.9(d)(2) 72 Fed. Reg. 27475, 27482, and 27484. Such fees represent significant costs to the borrower. Because such costs are normally considered as part of the loan cost, in loans as diverse as home mortgages to government-backed loans issued by the Export-Import Bank of the United States (Ex-Im Bank). In fact, not only does the Ex-Im Bank allow its own regulatory fees to be considered as part of the debt, under certain circumstances it allows ancillary fees to be part of the guaranteed loan.³ Based on this precedence and practice, we request that DOE change its definition to allow the subsidy cost and administrative fees to be part of the Project Costs.

6. Do Not Require a Pre-Application for Loan Guarantees for Nuclear Projects

While a pre-application for certain low-cost technologies may be appropriate to aid DOE in screening such loan guarantee applications, since a substantial developer expense is required to develop and submit a COLA to the NRC, nuclear projects should be exempted from the proposed solicitation of Pre-Application process. See Section 606.4; 72 Fed. Reg. 27475, 27481. As development of a COLA may cost between \$25 million and \$100 million,⁴ for new nuclear projects requiring that an applicant submit a COLA

³ Ancillary Services Fees Policy, EBD-M-13 (October 2003) <http://www.exim.gov/products/ebd-m-13.cfm>.

⁴ "PPL estimates the cost to proceed with the licensing phase to be approximately \$70 million, which would primarily be spent by the end of next year."
http://www.energyonline.com/Industry/News.aspx?NewsID=7157&PPL_Explores_Development_of_New_Nuclear_Reactor. See "NuStart Energy: Unleash the Potential. The benefits of building new nuclear-power plants" (estimating that the cost of approving licenses for six reactor projects could be as much as \$600 million). <http://www.nustartenergy.com/DisplayArticle.aspx?ID=20040503-3>

that the NRC staff has determined to be administratively complete is an adequate screen to determine whether applicants are seriously committed to the project.

7. Allow Investor Owned and Public Power Owners of a Qualifying Project to Each be Eligible for Loan Guarantees

Because nuclear power projects are capital intensive, many such projects are likely to involve more than one project owner seeking DOE loan guarantees. Proposed Section 609.6(a) provides, in part, "There may be only one Applicant per project." Proposed Section 609.2 defines the term Applicant as, "any person, firm, corporation, company, partnership, association, society, trust, joint venture, joint stock company, or other business entity or governmental non-Federal entity that has submitted an Application to DOE and has the authority to enter into a Loan Guarantee Agreement with DOE under the Act." The term "Project" does not appear to be defined in the NOPR. We request that DOE clarify Section 609.6(a) to state that, "Investor Owned Utility Owners and Public Power Owners of a qualifying Project may each be Applicants for a Project." In addition, we recommend that DOE define the term "Project" to be consistent with its view of "new or significantly improved technology" as a project that qualifies for consideration of DOE loan guarantees. If DOE requires only one applicant per project, for projects that involve multiple owners it will have to consider the impact of combined credit ratings of each and other complicating factors in order to judge the credit worthiness of the borrowers. In addition, public power members may finance their equity interest using tax exempt debt, taxable bonds, or by other means that would require evaluation separate from private interest loans. Thus, in order to set the terms of each loan based on the merits of each borrower and to allow each type of borrower to separately finance its interest in large projects that qualify for DOE loan guarantees, we request that DOE allow public power Project participants to apply for loan guarantees separately from their investor owned partners in a single qualifying project.

Comments Regarding DOE's Proposed Definition of "New or Significantly Improved Technology" and Related Matters

DOE has requested comment on alternative approaches to interpretation of the phrase "new or significantly improved technology." 72 Fed. Reg. 27474; see 72 Fed. Reg. 27480 (Section 609.2, defining "Commercial Technology"). DOE seeks to define this term as "technologies concerned with the production, consumption or transportation of energy, and that have either only recently been discovered or learned, or that involve or constitute meaningful and important improvements in the productivity or value of the technology." In addition, the proposed rule states that loan guarantees may not be issued to projects employing technologies in "general use" in the United States. Section 609.10(d)(1). DOE proposes two alternative definitions of "general use" and seeks comments on the alternative definitions and approaches. DOE proposes the following two alternatives for defining a technology in "general use:" (1) a technology that "has been ordered for, installed in, or used in five or more projects in the United States at the time the loan guarantee is issued" or (2) a technology that "has been in operation in a commercial project in the United States for" five years. DOE also seeks comments on whether the same definition of "general use" should be applied for all types of projects and technologies. 72 Fed. Reg. 27474.

As the following discussion demonstrates, what constitutes new nuclear technology should be defined separate from other technologies, and each type of new nuclear technology should be in commercial operation for a period of years before that technology is no longer "new" or in "general use." We offer two reasons for this recommendation.

First, regarding the definition of new or significantly improved technology, it should be clear that the same definition for new project may not apply to new nuclear projects as with other innovative technologies. The principal reasons for this are (1) the capital intensive nature of new nuclear development, and (2) the different technologies proposed, which represent vastly different scales of new technology as compared with other qualifying types of technologies. Vendors have pegged the capital cost of new nuclear power plants in the neighborhood of \$2,000 per kilowatt of generation capacity. Since these plants have a total capacity in excess of 1,300 megawatts, the total capital cost for these projects, with interest or other escalation, is staggering and far exceeds the total capital cost of the other qualifying technologies. In addition, there are at least five different reactor technologies that are being proposed for construction in the U.S. representing radically different levels of improvement on technology in operating U.S. reactors.⁵ All proposed reactor technologies represent improvement on operating technologies; none are currently in operation in the U.S.; and without loan guarantees, any one of the technologies may not be built. Since the purpose of applying the loan guarantee program to new nuclear technology is to encourage development of innovative nuclear technologies, it is reasonable, with respect to nuclear projects, to consider each reactor type as a distinct new technology that should receive the benefit of DOE loan guarantees "to advance important national energy policy priorities." 72 Fed. Reg. 27476.

Second, Commercial Technology Alternative 2 presents the better alternative for DOE funding projects that have achieved commercial operation (i.e., "Has been in operation in a commercial project in the United States for a period of five years as measured beginning on the date the technology was commissioned on a project."); however, since a new nuclear project will take between five to seven years to construct, starting from the date the project receives U.S. Nuclear Regulatory Commission ("NRC") approval of the project combined operating license application ("COLA"), starting the "clock" from "five years as measured beginning on the date the technology was commissioned on a project" may just arrive at or prior to the technology's in-service date. To achieve the benefit of the incentives under the Act, the loan guarantees should be available, to the extent of appropriations, until each distinct technology is in full commercial operation. Taking this to its next step, to be in "general use," at least two of each type of new technology must have achieved full commercial operation.

⁵ These include: (1) advanced boiling water reactors ("ABWR"); (2) economic simplified boiling water reactors ("ESBWR"); (3) advanced pressurized water reactors ("AP1000"); (4) the European pressurized water reactors ("EPR"); and (5) the Mitsubishi Heavy Industries advanced pressurized water reactors ("MHwe APWR"). See <http://www.nrc.gov/reactors/new-licensing/new-licensing-files/new-rx-licensing-app-legend.pdf>.

Conclusion

In closing, we offer our thanks to DOE for soliciting comments in response to the NOPR. We understand the competing pressures influencing DOE's drafting of the NOPR and urge that it consider all entities involved when developing the final rule and adopt a loan guarantee program that meets the borrowers' and the investment banks' requirements for a 'financable' loan, meets each Applicant's needs to go forward with qualifying projects, and fulfills the promises of the Act. Please give appropriate consideration for the public power needs to the extent those differ from the needs of other applicants. Finally, we urge the DOE in its budget requests to Congress to request sufficient funds for the loan guarantee program and for loan authorizations to adequately fund the \$50 - \$100 billion in loan applications that will come from the first wave of new reactor developers.

Please contact me if you have any questions about these comments.

Sincerely,

A handwritten signature in black ink, appearing to read "Robert K. Temple".

Robert K. Temple
Deputy General Counsel &
Assistant Secretary
CPS Energy